

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

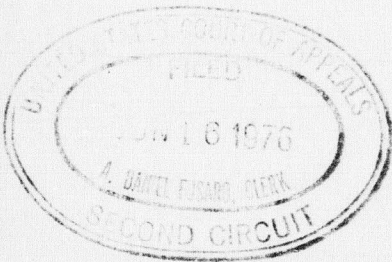
No. 76-4100

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

SZABO FOOD SERVICES, INC., *Petitioner*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Review of Decision and Order of
National Labor Relations Board

BRIEF FOR PETITIONER



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BRIEF FOR PETITIONER

STATEMENT OF ISSUE

WHETHER THE BOARD'S DETERMINATION THAT THE EMPLOYER'S FOOD SERVICE OPERATION AT THE SIKORSKY PLANTS IS AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND UNREASONABLE IN THAT IT FRACTIONATES, WITHOUT SUBSTANTIAL JUSTIFICATION, A MULTI-UNIT OPERATION WHOSE

FUNCTIONS ARE CONCEDEDLY INTEGRATED AND WHOSE LABOR POLICIES ARE CENTRALLY DIRECTED AND ADMINISTERED.

STATEMENT OF THE CASE

A. Nature of the Case

This case is before the Court on a petition filed by Szabo Food Services, Inc., (hereinafter "Employer"), under the provisions of Section 10(f), National Labor Relations Act, (29 U.S.C. 160(f)), and Rule 15(a) Federal Rules of Appellate Procedure seeking a review of the Decision and Order of the National Labor Relations Board, (hereinafter "Board"), issued on March 1, 1976, in Board Case No. 2-CA-13913.

B. Course of Proceedings and Disposition By the Agency Below

On September 11, 1974, a Petition was filed with the Regional Director, Region 2, of the Board by Local 217, Hotel and Restaurant Employees and Bartenders Union, AFL-CIO (hereinafter "Union") for certification as the exclusive collective-bargaining representative of all food service employees at the Employer's food service operations in the Stratford, Connecticut and Bridgeport, Connecticut plants of the Sikorsky Aircraft Division of United Aircraft Corporation.

After an evidentiary hearing conducted before a hearing officer, on October 2 and 31, 1974, the Regional Director, on December 19, 1974, issued a Decision and Order dismissing said Petition on the grounds that the unit requested had been effectively integrated into a broader, district-wide unit and was too limited in scope to constitute an appropriate separate bargaining unit (App. 3).

On February 19, 1975, the Board granted the Union's Request for Review of the Regional Director's Decision and, on July 25, 1975, in a majority Decision of a three

member panel, reversed the Regional Director and directed an election in the requested unit¹ (App. 10).

On September 2, 1975, following an election in which a majority of eligible voters cast ballots for the Union, the Board certified the Union as the exclusive collective-bargaining representative of all food and service employees in the Employer's Stratford and Bridgeport, Connecticut locations.

Upon a charge filed by the Union, the Regional Director issued a Complaint on October 10, 1975, alleging that the Employer was engaging in unfair labor practices by refusing to bargain collectively with the Union at the Stratford and Bridgeport, Connecticut locations in violation of Sections 8(a) (1) and (5) of the National Labor Relations Act.² The Employer filed an Answer to the Complaint on October 23, 1975, which denied that the Stratford and Bridgeport locations constituted an appropriate unit for collective bargaining. Thereafter, the Acting General Counsel filed a Motion for Summary Judgment, which was granted by the Board on the ground that the Employer was not entitled to relitigate issues which had previously been litigated in the representation proceedings. The Board therefore directed the Employer, *inter alia*, to cease and desist from engaging in the charged unfair labor practices and to bargain collectively with the Union in the designated unit³ (App. 20).

The Employer now petitions this Court to review and set aside the Decision and Order of the Board.

STATEMENT OF THE FACTS

The Employer is an industrial food service contractor primarily engaged in the operation of cafeterias and food

¹ 219 NLRB No. 102, 89 LRRM 1711. Members Fanning and Jenkins in the majority. Member Kennedy dissented.

² 29 U.S.C. §§ 151, *et seq.*

³ 222 NLRB No. 193.

catering services (T. 19).⁴ Since at least 1961, the Employer has had a contract with United Aircraft Corporation to maintain and service cafeterias, dining rooms and kitchens for feeding United's employees at its plants in the State of Connecticut (T. 19, Co. Ex. 1). In order to perform its contractual obligations to United, the Employer has established in Connecticut an operating unit, (i.e., an operating "cost center" T. 47), referred to as its United Aircraft District where it operates 18 cafeterias and one Central Kitchen at 10 separate United locations, with a total workforce of approximately 415 employees. District headquarters is located in East Hartford and the other locations range from 5 to 67 miles from the East Hartford facility⁵ (T. 22, 28, 44-46, Co. Ex. 3).

A District Manager is responsible for the administration and operation of the United Aircraft District and is responsible for no other part of the Employer's operations (T. 22). Reporting to the District Manager are three areas supervisors each of whom is directly responsible for the operation of several cafeterias within the District. Area supervisors are assisted by local managers (or "chef managers") at each of the locations (T. 24, Co. Ex. 3).

The business activities of the United Aircraft unit are administered pursuant to the one contract with United, with the consequence that all facets of the day-to-day food service operation are identical at each of the several locations. Thus, all menus and food prices are the same (T. 31, 56-57). Each location follows the same methods of food preparation and serving as well as the same clearing and maintenance practices. Purchasing of food items is central-

⁴ "T." references are to the transcript of proceedings of the N.L.R.B. hearing held on October 2 and 31, 1974. Subsequent references to "Co. Ex." are to Company Exhibits submitted at the hearing.

⁵ East Hartford is also the largest single facility in the District; seven cafeterias are located there. The remaining cafeterias are located at Windsor Locks, Farmington, Middletown, South Windsor, Southington, North Haven, Stratford, Bridgeport and Norwalk.

ly controlled; purveyors are selected by a corporate vice-president in Chicago who also determines the type, quantity, and prices of all food which can be ordered for the various cafeterias in the District (T. 26-27, 55). All baked goods are prepared in the Central Kitchen in East Hartford and delivered to each location (T. 26, 61).

The Employer's labor relations policy for the United Aircraft unit is directed, controlled and implemented on an effective day-to-day basis by the District Manager. All material elements of the collective bargaining process are identical in substance and uniform in administration throughout the District. Thus, the District Manager (i) establishes the same wages, benefits, employee classifications, and terms and conditions of employment at each of his cafeterias (T. 25, 32, 50, 51, 54, 57-60, 66); (ii) determines the number of employees at each location (T. 25, 52-53); (iii) directs and controls promotions and permanent and temporary transfers on a district-wide basis (T. 25, 30-31, 48-49, 75); (iv) makes final determinations on layoffs (T. 53); (v) is the final authority for the resolution of grievances (T. 24, 25, 53-55, 57-59); (vi) coordinates and controls all payroll, accounting and personnel records on a district-wide basis (T. 27-28); (vii) controls and administers disciplinary measures, except that the local manager can "talk" to recalcitrant employees without seeking higher approval (T. 24-25, 54-55); and (viii) has singular authority to fire employees, except that the local manager can fire employees for gross misconduct requiring immediate action such as assault and battery on a supervisor (T. 24-25, 54-55).

The unit sought by the Union and certified by the Board consists of one cafeteria at Bridgeport and two cafeterias at Stratford (T. 68). The two locations are treated as a single operation, have a combined workforce of about 50 employees, and share a local manager whose responsibility and authority is the same as all other local managers

in the district-wide unit (Co. Ex. 3). Specifically, he may (i) after advising the District Manager of the vacancy, hire replacements for existing hourly-rated, entry-level jobs, using uniform company hiring forms (T. 52-54); (ii) discharge employees for extraordinary misfeasance (T. 25); (iii) make on-the-spot verbal corrections (all other discipline must either be approved or administered by the area supervisor and District Manager) (T. 25, 54); and (iv) submit recommendations to higher levels of supervision respecting wage increases, transfers, promotions, and layoffs (T. 25, 53).

During the 12 months preceding the hearing, there were 700 documented temporary transfers among the 415 employees in the district-wide unit (T. 30-31).

ARGUMENT

THE BOARD'S DETERMINATION THAT THE EMPLOYER'S FOOD SERVICE OPERATION AT THE SIKORSKY PLANTS IS AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND UNREASONABLE IN THAT IT FRACTIONATES, WITHOUT SUBSTANTIAL JUSTIFICATION, A MULTI-UNIT OPERATION WHOSE FUNCTIONS ARE CONCEDEDLY INTEGRATED AND WHOSE LABOR POLICIES ARE CENTRALLY DIRECTED AND ADMINISTERED.

A. Scope of Review

Section 9(b) of the National Labor Relations Act^{*} directs the Board in representation cases to determine the unit appropriate for collective bargaining. In carrying out its function the Board must exercise a "large measure of informed discretion," *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2d Cir. 1968), which necessarily implies that it (i) has rationally explained any departure from relevant

^{*} 29 U.S.C. § 159(b).

criteria established in other cases involving similar situations, *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); *NLRB v. Davis Cafeterias*, 358 F.2d 98 (5th Cir. 1966); (ii) has given due consideration to *all* the relevant factors, *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422-423 (1947); and (iii) has not given controlling weight to the extent to which the union has organized the Employer's operation.⁷ Otherwise, the Board's unit determination is arbitrary and unreasonable and must therefore be set aside. *NLRB v. Solis Theatre Corp.*, *supra*.

In the instant case, the Board's unit determination is fatally defective in all three respects.

B. The Board's Unit Determination Is Arbitrary and Unreasonable In That (1) It Is Inconsistent With Relevant Precedent; (2) It Ignores, Misstates Or Misconstrues Relevant Facts Of Record; and (3) It Gives Controlling Weight To The Extent Of Organization.

1. THE UNIT DETERMINATION IS SUBSTANTIVELY INCONSISTENT WITH PRECEDENTS ESTABLISHED IN OTHER CASES INVOLVING SIMILAR CIRCUMSTANCES.

In *NLRB v. Solis Theatre Corp.*, *supra*, 403 F.2d 381 (2d Cir. 1968) this court recognized that any unit determination by the Board must balance the interests of employees with respect to union representation against "the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations." *Id.* 403 F.2d at 382. In that case, the Board's order directing the Employer to bargain with a union certified in a unit consisting of one theatre in a fifteen theatre district was denied enforcement on the ground that the unit determination was arbitrary and unreasonable. The factual cornerstone of the court's decision was the

⁷ Section 9(c)(5) of the National Labor Relations Act (29 U.S.C. 159(c)(5)) provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

existence of a *centralized labor policy* which established the same wages, hours and working conditions for all theatres in the district.

"It is of marked significance that Interboro [the Employer] sets a single labor policy for the entire circuit, which has resulted in similar wages, hours, and working conditions for all of its employees." *Id.* at 383.

The Court further noted that the authority of the local manager was "limited to little more than overseeing the daily activities of the employees" and that,

"The Courts of Appeals have been reluctant to sanction bargaining units whose managers lack the authority to resolve issues which would be the subject of collective bargaining."

Later, in *Continental Insurance Company v. NLRB*, 409 F.2d 727 (2d Cir. 1969) this court stated that while centralized labor relations policy is not the single determinant, it is a central consideration in the determination of an appropriate bargaining unit. *Continental* succinctly restated the holding in *Solis Theatre*:

"The holding of *Solis Theatres*, therefore, is that the Board may not, without substantial justification, fractionate a multi-unit operation whose labor policy is centrally directed and administered." *Id.* 409 F.2d at 729.⁸

Thus, a unit determination which carves out a separate bargaining unit from a broader integrated business organization which operates under a uniform, centralized labor policy may not, absent substantial justification, be upheld.

⁸ A single branch unit was found justified in *Continental* because: "each Branch Claims Office in question is a separate autonomous unit, enjoying complete control over the processing of the vast majority of claims. In addition, the Branch Claims Managers possess considerable influence in the final decisions with respect to the personnel matters described above." *Id.*

In the instant case, the Employer's labor policy for its United Aircraft District emanates from and is implemented uniformly on a District-wide basis through the office of the District Manager. Wages, benefits, employee classifications and allotments, terms and conditions of employment, promotions, transfers, layoffs, grievances, discipline and recordkeeping are established, controlled and administered by the District Manager in an identical fashion as to each location. Operations are similarly centralized. Menus, prices, food purchasing, preparation, and serving are centrally established and directed under the terms of one contract with one customer and are the same at each facility. Indeed, the evidence of centralized labor policy and centralized control and administration over operations was so compelling that the Board was forced to acknowledge that the District-wide unit was functionally integrated and would also constitute an appropriate bargaining unit:

"While it appears that the broader district-wide unit favored by the Employer would [also] be appropriate for purposes of collective bargaining . . ." (App. 13).

"Also, *despite the integration of all operations of the district, . . .*" (App. 14) (emphasis added).

"It appears that they [area supervisors] act as liaisons between district headquarters and the units, especially with regard to matters as detailed below, *which are closely controlled by headquarters.*" [whereupon follows a description of the Employer's district-wide operations] (App. 12, Fn. 3) (emphasis added).

Given the centrally directed and commonly administered labor relations program and the functionally integrated business operations throughout the United Aircraft unit, the validity of the Board's single location unit determination must, under *Solis Theatre* and *Continental*, turn on the presence of some other "substantial justification." Traditionally, in deciding questions of this nature the Board looks to whether there exists a "community of interest"

in the proposed unit which is sufficiently separate and distinct from the existing broader unit to justify an independent entity for collective bargaining purposes. *Zanetti Riverton Bus Lines*, 128 NLRB 830 (1970); *Continental Baking Co.*, 99 NLRB 777 (1952). There is no such justification here and, moreover, the Board's finding that a separate community of interest exists at the Sikorsky operations is wholly at odds with the facts of record and is inexplicably inconsistent with the findings and conclusions in other relevant cases. To illustrate:

- a. *The Board departed from precedent in erroneously according "first and foremost" significance to the presence of an immediate supervisor at the Sikorsky cafeterias.*

The Board's separate "community of interest" finding relies principally on the fact that the Sikorsky cafeterias are under the immediate supervision of a local manager:

"That these employees have a community of interest separate and distinct from the broader one they share with other district employees, sufficient to support an appropriate unit finding, is amply demonstrated by the following factors: First, and foremost, the requested employees are under the common immediate supervision of a single manager by virtue of the fact that three Sikorsky Division cafeterias are grouped together as a single unit or cost center for purposes of accountability" (App. 13-14).

The Board's determination thus rests principally on the fact that an individual has *some* responsibility for the operation of the Sikorsky cafeterias—a fact which is hardly relevant much less a "first and foremost" consideration. The relevant consideration concerns not the existence of some supervision—any working unit must have some one responsible for its activities—but the nature and degree of authority exercised. Moreover, in predicated its determination on this factor, the Board has apparently, and

without explanation, departed from its long held position that:

“First and foremost is the principle that mutuality of interest in wages, hours and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit.” *Continental Baking Co., supra*, 99 NLRB 777 (1952) (emphasis added).

The record here establishes beyond question that the community of interest respecting wages, hours, working conditions—indeed, regarding *every* significant facet of employment—exists on a district-wide basis and is *not* divisible among the various components within the overall United Aircraft unit.

- b. The Board departed from precedent in erroneously concluding that the Sikorsky unit manager maintains significant control over day-to-day operations.*

Another predicate of the Board's determination was its finding that the local manager exercised significant day-to-day control over the local operations—a finding derived primarily from the local manager's authority to fire employees for extraordinary misbehavior and to hire hourly employees to fill vacancies in entry level jobs:

“Also, despite the integration of all operations of the district the Sikorsky unit manager retains significant control over day-to-day operations, especially with regard to discharge of employees for serious misconduct and the hiring of replacements” (App. 14).

The Board has in this case evaluated the hiring and firing authority of the local managers in a vacuum, oblivious to the reality that such authority may be exercised only in the narrowest of confines and at all times subject to the exacting scrutiny of higher levels of supervision. For example, the local manager may fire an employee only for an extraordinary cause necessitating immediate action (T.

25).⁹ All other disciplinary measures, except for on-the-spot verbal conferences, must be authorized by the area supervisors and the District Manager (T. 25, 54). There is no evidence that a local manager has *ever* fired an employee for gross misbehavior. As a practical matter, then, the only day-to-day disciplinary authority vested in the local manager is that of *talking* to the involved employee.

With respect to hiring, the number of jobs at each location is determined by the District Manager and hiring new employees for new jobs is effected through him as well (T. 53-54). The local manager may only hire replacements for vacancies occurring in existing hourly-rated, entry-level jobs, using uniform company hiring forms, and then only after advising the District Manager of the opening (T. 53-54)—facts largely ignored by the Board.

In finding such meager authority the principal indicium of day-to-day control in this case, the Board is at variance with its own precedents and those of Courts of Appeal where the existence of similar and in some respects greater local control was *not* considered sufficient to warrant the fracturing of a multi-unit operation. For example:

(i) *Twenty First Century Restaurant*, 192 NLRB No. 103 (1971): In *Twenty First Century*, the Board dismissed the union's petition to organize one restaurant in an overall operation consisting of 22 separately incorporated restaurants located in the New York-New Jersey area¹⁰ notwithstanding that the local manager could and did: hire new employees at the minimum wage rate; discharge employees within the 90 day probationary period and thereafter effectively recommend discharge; impose various other forms of discipline; effectively recommend wage increases; train employees; purchase certain nonperishable food items;

⁹ E.g., assaulting a supervisor (T. 25).

¹⁰ The New York and New Jersey operations each constituted separate divisions.

draw up the weekly work schedule; select those employees who would work during the week; determine work assignments, grant time off; and determine overtime assignments. The existence of such local control—far surpassing that in the instant case—was not enough to justify a single restaurant unit in *Twenty First Century Restaurants* because of factors such as centralized labor policy and recordkeeping, a managerial hierarchy consisting of general manager/field supervisors/local manager, same food, same prices, same hours—factors which are equally present in the case *sub judice*, albeit minimized in significance or wholly ignored by the Board.

(ii) *Gray Drug Stores, Inc.*, 197 NLRB 924 (1972): In *Gray*, although the individual store manager was found to be, for the most part, in charge of day-to-day operations, the Board deemed a single store unit in an 11 store county-wide operation inappropriate primarily because of what it described as the “limited” managerial authority of the store manager, to wit: authority to suspend and discipline employees short of discharge; hiring authority under restricted circumstances; preparation of work and vacation schedules subject to approval of higher management; consultative authority regarding employee evaluation, promotion and hiring; authority to adjust minor grievances.

(iii) *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966): In that case, the Seventh Circuit held that a single restaurant was not an appropriate bargaining unit where it was part of a chain of separately incorporated restaurants located in Indianapolis having common ownership and management. The court's decision rests on factors which are also descriptive of the Employer's operations in the present case: centralized labor policy; organizational structure consisting of president/area supervisors/local managers;¹¹ central selection of local suppliers;

¹¹ It was also noted in *Frisch's* that higher management regularly visited the restaurants. The record in this case does not reflect the frequency of such visits.

centralized payment for supplies; central payroll; accounting and other records; same food and menus; same basic mode of operation; same working conditions; central warehouse;¹² and central determination of minimum and maximum levels of employment at each restaurant. These factors in Frisch's, which are likewise substantially present here, outweighed any suggestion of local control which might have stemmed from the local manager's authority to hire employees for his own restaurant—a factor which in the instant case was one of the two elements on which the finding of "significant day-to-day control" rested.

(iv) *NLRB v. Davis Cafeterias*, 396 F.2d 18 (5th Cir. 1968): In *Davis*, the Court of Appeals denied enforcement to the Board's bargaining order where the union had been certified in a unit consisting of 2 cafeterias in an 8 cafeteria operation located in southern Florida. Once again, the court found compelling such factors as central labor policy; central payroll and other records; standard wages, benefits, hours and prices; master menu; and central food purchasing. The Board in *Davis* had premised its determination largely on the local manager's authority to hire and fire and to recommend wage increases—authority described by the Court of Appeals as not indicative of "local managerial authority over substantive subjects of collective bargaining."

In short, the Board's determination in the instant case that the local manager of the Sikorsky cafeterias exercises significant day-to-day control rests on the seldom exercised and extremely circumscribed hiring and firing authority vested in the local manager—a factor which, in light of the overwhelming evidence of centralized control and administration over all operations and over the most substantive elements of collective bargaining, does not, under the cri-

¹² The Employer in the instant case has a central kitchen and because of its centralized purchasing procedures does not require a central warehouse.

teria applied in previous cases, justify the establishment of a single location bargaining unit.

- c. The Board departed from precedent in failing to give due consideration to the fact that the district-wide operation was governed by the terms of one contract and that its only function was to provide service to one customer.*

The Board majority cursorily noted that the Company's food programs are "administered uniformly pursuant to the contract with United Aircraft," (App. 12), but, unlike their dissenting colleague and the Regional Director, failed to take into account the real significance of the single contract under which the entire district operation was chartered. In his dissenting opinion, Member Kennedy observed:

Like the Regional Director, I think it highly significant that all cafeteria employees of the Employer are engaged in the performance of a single contract with United Aircraft. Pursuant to that contract, all menus and all prices are the same in all cafeterias. The district manager who administers this contract establishes the same wages, hours, and working conditions for all the employees in all the cafeterias in the United Aircraft facilities. Thus, under one contract with the Employer, United Aircraft sets identical conditions and requirements for the operation of all the cafeterias, and it appears that all complaints or matters pertaining to that contract are handled at the district manager level. (App. 16).

The dissenting opinion is thus consistent with the Board's previous decision in *Marriott In-Flite Services*, 209 NLRB 478 (1974) which dismissed the union's petition to organize only 4 of the Employer's 8 cafeterias partially on the ground that all 8 cafeterias operated under the terms of one contract with the airlines.

Like the *Marriott* case, the Employer's United Aircraft unit provides but one service to one customer under the provisions of one contract. Of necessity, therefore, its operations are functionally integrated; its menus, prices, food purchasing, preparation, service, and distribution standardized; and its costs, wages, benefits and working conditions uniform. The impact of the *single contract* and the *single function* for a *single customer* on district-wide labor relations policy is all pervading. All employees throughout the District are hired for a single purpose: "to put the feeding operation out" (T. 31). Toward that end, the Employer draws on all its employees and transfers them temporarily from place to place to meet the changing needs of each location (T. 67). Unlike the typical functionally independent retail chain store, for example, spiraling labor costs at one of the Employer's United Aircraft locations would be felt throughout the entire operation, possibly driving overall costs to a non-competitive level resulting in a termination or non-renewal of the entire United contract. Similarly, strikes or other labor unrest at one location could jeopardize the contract for all locations. Under these circumstances, the existence of a single location bargaining unit would, as described by Member Kennedy, result in the "tail wagging the dog" and, in consequence, would distort the district-wide context in which all collective bargaining issues are established and administered. In this respect, the Sixth Circuit pointed out in *NLRB v. Pinkerton's, Inc.* 428 F.2d 479, 484 (6th Cir. 1970):¹³

"[If] the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable bargaining is undermined, rather than

¹³ In *Pinkerton*, the Court of Appeals denied enforcement to a Board order directing the Company to bargain with the union as representatives of employees at a single location of a district-wide security guard organization. The court held that where labor policy is centrally determined and where the local manager does not have authority to determine questions of collective bargaining, the local unit is not appropriate for bargaining.

fostered, and could create a state of chaos rather than stable collective bargaining.”¹⁴

There is, then, no indication that the Board’s determination in this case took into account, as it must, “the feasibility and disruptive effects of piecemeal unionization,” *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931, or the legitimate interest of an integrated, multi-unit employer such as Szabo in maintaining district-wide labor relations. *NLRB v. Solis Theatre, supra*, 403 F.2d at 382.

2. THE BOARD’S DECISION IGNORES, MISSTATES OR MISCONSTRUES RELEVANT FACTS OF RECORD WHICH WOULD SUPPORT A DISTRICT-WIDE UNIT DETERMINATION, AND FURTHER DEPARTS FROM RELEVANT CRITERIA ESTABLISHED IN PRIOR CASES.

If the Board considers certain facts of record but ignores, misstates or misconstrues other equally relevant facts which might support a different finding, its determination must be set aside. *NLRB v. Purity Food Stores, Inc., supra*, 354 F.2d at 928-931. In that regard, the Board’s unit determination in the instant case is a paradigm of selective factual analysis. It accords significant weight to certain portions of the record while ignoring or misconstruing the significance of other equally relevant factors which in their totality and under the guidelines approved by the Board and various Courts of Appeal in other cases compellingly demonstrate the inappropriateness of a single location bargaining unit in this case. For example:

¹⁴ See also, *Kalamazoo Paper Box Corporation*, 136 NLRB 134, 137 (1962) cited in Member Kennedy’s dissent in the instant case. (App. 17)

a. *In addition to placing undue significance on the limited hiring and firing policy of the local manager, the board's finding of "significant day-to-day control" rests on other fundamental misperceptions relating to local management authority.*

(i) While the Board mentioned that the local manager may submit recommendations for promotions, it failed to acknowledge the critical factor that promotions are made on a district-wide basis under the personal control of the District Manager; that whenever a promotion opportunity arises, the District Manager surveys all of the cafeterias in the United Aircraft district for qualified employees, requires that interested employees be interviewed, and approves the selection of an employee for the promotion (T. 59-60).

(ii) The Board mistakenly asserted that the unit manager "*purchases food-stuffs from a list which has been approved by central management in Chicago*" (App. 12, emphasis added). In fact, the unit manager can purchase nothing: "*There is no purchasing involved [by the local manager]*" (T. 27). All purchasing is handled by a corporate vice-president (T. 26). The local manager can merely *order* specified food from specified purveyors, in specified quantities, at a specified price all of which is pre-determined in a list that is not merely "approved" but is in fact *prepared* by corporate headquarters (T. 26-27). Under the circumstances, the local manager has no discretion in the food acquisition process and it was therefore erroneous for the Board to accord significance to his responsibilities in this respect. *NLRB v. Purity Food Stores*, *supra*, 354 F.2d at 930, Fn. 16; *NLRB v. Davis Cafeterias*, *supra*, 396 F.2d at 20.

(iii) Although the Board noted that the District Manager sets overall wage rates (App. 12), it failed to mention that he is also responsible for such *local* wage controls as reviewing the daily time sheets of each employee in the district, checking the accuracy of the payroll for each em-

employee, and submitting the individual pay records to corporate headquarters for processing and storage. (T. 27-28). The Board also failed to mention that the wage rates which are established by the District Manager are *uniform* for all classifications of employees throughout the district and, further, that all employee classifications are established by the District Manager on a uniform, district-wide basis. In the same regard, the Board failed to mention that all employment benefits—e.g., health insurance, vacations, holidays, sick leave, etc.—are administered on a district-wide basis and are the same for all locations (T. 60, 66).

- b. *The Board erroneously accorded significance to the fact that the Sikorsky cafeterias constitutes a "cost center" for the purposes of accountability while failing to mention that the entire United Aircraft District constitutes one "cost center" for overall operations, the only significant consideration in this regard.*

In finding a separate "community of interest," the Board found it significant that the Sikorsky cafeterias are considered "a single cost center or unit" (App. 12). The Board failed, however, to consider that the "cost center" designation for the individual cafeterias is strictly a label of convenience, one that is intended only to facilitate the management of the district-wide unit.¹⁵ And more importantly, the Board wholly *ignored* the fact that the entire United Aircraft division is the single, *operational* "cost center":

Union Attorney:

Q. "Now, what, in your operational set up, is a cost center—what does it signify?"

Brower:

A. "Okay. In this operational aspect, from a corporate standpoint, the Connecticut operations of United Aircraft are a cost center. One account. . . ." (T. 47).

¹⁵ Its only purpose is to help the District Manager keep abreast of his overall operation: "it's an identity process" (T. 47).

Under prevailing Board standards, operational integrity—not administrative identity—is the keystone in determining an appropriate unit in a multi-facility operation.¹⁶ Yet, in this case, the Board considered important the inconsequential fact that individual cafeterias were “cost centers” for purposes of administrative recordkeeping while inexplicably according *no* weight to the fact that the district-wide unit was a single cost center for operational purposes.

c. The Board erroneously minimized the significance of the rate of temporary interchange of employees throughout the district-wide unit.

The Board found that 700 temporary transfers out of 415 employees throughout the district during the preceding twelve month period did not constitute a “regular or frequent” rate of employee interchange (App. 14). The Board’s finding in this respect is unsupportable for these reasons:

First, the finding is partially rooted in the Board’s observation that “only” 16% of these transfers involved the Sikorsky cafeterias—an observation which apparently fails to consider that Sikorsky represents only about 12% of the district-wide workforce (App. 11).¹⁷

Second, the Board further discounted the significance of the transfers because it appeared that they frequently were occasioned by “special functions” such as foremen’s dinners,¹⁸ family days, etc. (App. 13), thus creating an apparently new test—and one of dubious relevance—for measuring the significance of employee interchange. (See

¹⁶ See e.g., *Haag Drug Co., Inc.*, 169 NLRB 877 (1968).

¹⁷ The district-wide unit employs about 415 employees, about 50 of whom work in the Sikorsky cafeterias (App. 11).

¹⁸ The Board mistakenly noted that the foremen’s dinners occurred monthly. In fact, such dinners were scheduled on a less frequent basis (T. 70).

e.g., *Gray Drug Stores, Inc.*, 197 NLRB 924 (1972) where the Board found a "substantial and frequent interchange of employees"¹⁹ notwithstanding that many of the transfers were effected for such "special" events as "remodeling of a store, grand opening of a new store, [and] closing of a store."²⁰

Third, the Board totally ignored the fact that all employee transfers are controlled by and coordinated through the area supervisor and district manager (T. 75).

Fourth, the Board further overlooked the fact that employees are regularly promoted to other locations throughout the District.

Finally, the Board's conclusion is at variance with its own prior standards. E.g.: *National Telephone Company, Inc.*, 215 NLRB No. 17, 87 LRRM 1688 at 1690 (1974) (36 temporary transfers out of 80 employees during 9 or 10 month period described by Board as "not infrequent."); *Consolidated Foods Corp.*, 213 NLRB No. 60, 87 LRRM 1170 (1974) (204 temporary transfers²¹ out of 334 employees during 12 month period regarded by Board as significant); *Twenty First Century Restaurant, supra*, 192 NLRBB 881 (1971) (45-50 temporary transfers out of 350 employees during 12 month period regarded by Board as significant); *Gray Drug Stores, Inc., supra*, 197 NLRB at 925 (300 temporary transfers out of 700 employees during 6 month period described by Board as "substantial and frequent"); *Marriott In-Flite Services, supra*, 209 NLRB No. 74, 85 LRRM at 1409 (775 temporary transfers out of 744 employees during 12 month period described by Board as "significant").

¹⁹ *Id.* at 925.

²⁰ *Id.*

²¹ In *Consolidated*, the statistics counted as two separate instances a transfer out of and a transfer back to an employee's home store.

- d. The Board erroneously accorded significance to the fact that the Sikorsky cafeterias are separated from other cafeterias in the United Aircraft unit by a range of 14 to 65 miles since the limited geographical separation in this case in no way impaired the functional integration of the district-wide unit.

The Board's opinion correctly notes that the distances separating the Sikorsky cafeterias from other cafeterias in the district range from 14 to 65 miles (App. 12). It erred, however, in using this factor to support its unit determination. As noted, the key factor underlying all of the Board's unit determinations is the presence or absence of a separate and distinct community of interest—a factor which, in turn, pivots on the existence or non-existence of functionally integrated activities and similar terms and conditions of employment. Logically, then, geographic factors would be relevant only insofar as they would have a bearing on functional integration and, in consequence, on the separate community of interest existing in the given unit. Thus, in *Caron Internatioanl, Inc.*, 222 NLRB No. 89, 91 LRRM 1265 (1976), the Board noted that "the 25-mile radius separating the plants does not interfere with this integration." *Id.* at 1265. So too, for example, in *Wackenhut Corp.*, 213 NLRB 1148 (1948); *National Telephone Company, Inc.*, *supra*; *AMF Incorporated*, 205 NLRB 984 (1973); and *NLRB v. Purity Food Stores, Inc.*, *supra*, the geographic factor was subordinated to factors such as centralized wage and labor relations policy which most significantly affect the common employment interests of the employees. In the instant case, notwithstanding the functional integration and community of interest concededly existing with respect to the district-wide unit, geographic separation was erroneously accorded significance in the establishment by the Board of a separate bargaining unit for the Sikorsky cafeterias. Member Kennedy, in his dissent, correctly perceived the inappropriateness of the majority's reliance on the geographical factor in this case:

"Even if the minimal geographic separation in this case were considered important enough to warrant a single unit, the centralization of wage policy and key personnel decisions compel finding the broader unit appropriate" (App. 18).

In sum, the Board's finding in this case is the end product of an incomplete, selective and, in critical respects, distorted consideration of the facts of record and, as such, should be set aside.

3. THE BOARD'S FINDING ERRONEOUSLY ACCORDS CONTROLLING WEIGHT TO THE EXTENT OF ORGANIZATION.

In determining a unit appropriate for collective bargaining the Board may not give controlling weight to the extent to which the union has organized the Employer's operations. (Section 9(c) (5) National Labor Relations Act).²² As noted by the Supreme Court in *NLRB v. Metropolitan Life Insurance Co.*, *supra*, 380 U.S. 438, 441-442 (1965), under § 9 (c) (5) the extent of organization may be considered as one factor but not the *determinative* factor in establishing an appropriate bargaining unit.

In the instant case, the Board found two units appropriate for collective bargaining: the district-wide unit favored by the Employer and the Sikorsky unit organized by the Union (App. 13). The Sikorsky unit was selected as the bargaining unit purportedly because employees at that location enjoy a "community of interest separate and distinct from the broader one they share with other district employees." But, as more fully maintained above, there is no basis in fact or law for the finding of a separate community of interest. All circumstances and conditions of employment as well as all facets of the business operation are the same at all locations throughout the District. Nothing except the geographical accident of location distinguishes

²² See fn. 7.

employees of the Sikorsky unit from employees at other United Aircraft cafeterias.

The Board's purported rationale for the fragmentation of the overall unit does not, then, withstand analysis. An objective examination of the facts and circumstances reveals instead an underlying—albeit unspoken²³—rationale, to wit: that as between the two units found to be appropriate for collective bargaining the smaller one should be selected because it alone had been organized by the Union. The real controlling factor, upon which the unit determination was made in this case thus clearly appears to have been the extent to which the employees in the district-wide unit had been organized. For that reason, the Board's determination must be set aside as being in contravention of § 9(c) (5).

CONCLUSION

For the reasons hereinabove stated, the Decision and Order of the Board in NLRB Case No. 2-CA-13913, dated March 1, 1976, should be set aside.

Respectfully submitted,

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²³ Naturally, the Board's opinion does not expressly identify extent of organization as the controlling factor, but the Union's brief to the Board heavily relies on that argument (App. 9-10), and the Board's opinion specifically notes that "no labor organization is seeking to represent the broader unit formed by the Employer" (App. 14).

CERTIFICATION OF SERVICE BY MAIL

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For the Second Circuit

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No. 76-4100
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v.

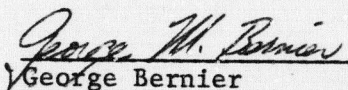
National Labor Relations Board, Respondent.

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BRIEF, JOINT APPENDIX AND EXHIBIT TO JOINT APPENDIX
—

were served on each of the following persons, who have been represented to me as opposing counsel in said action, by first class mail, with proper postage applied and deposited in a mail box of the United States Postal Service:

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